IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 726

BURLINGTON-CHICAGO CARTAGE, INC.,
Appellant,

vs.

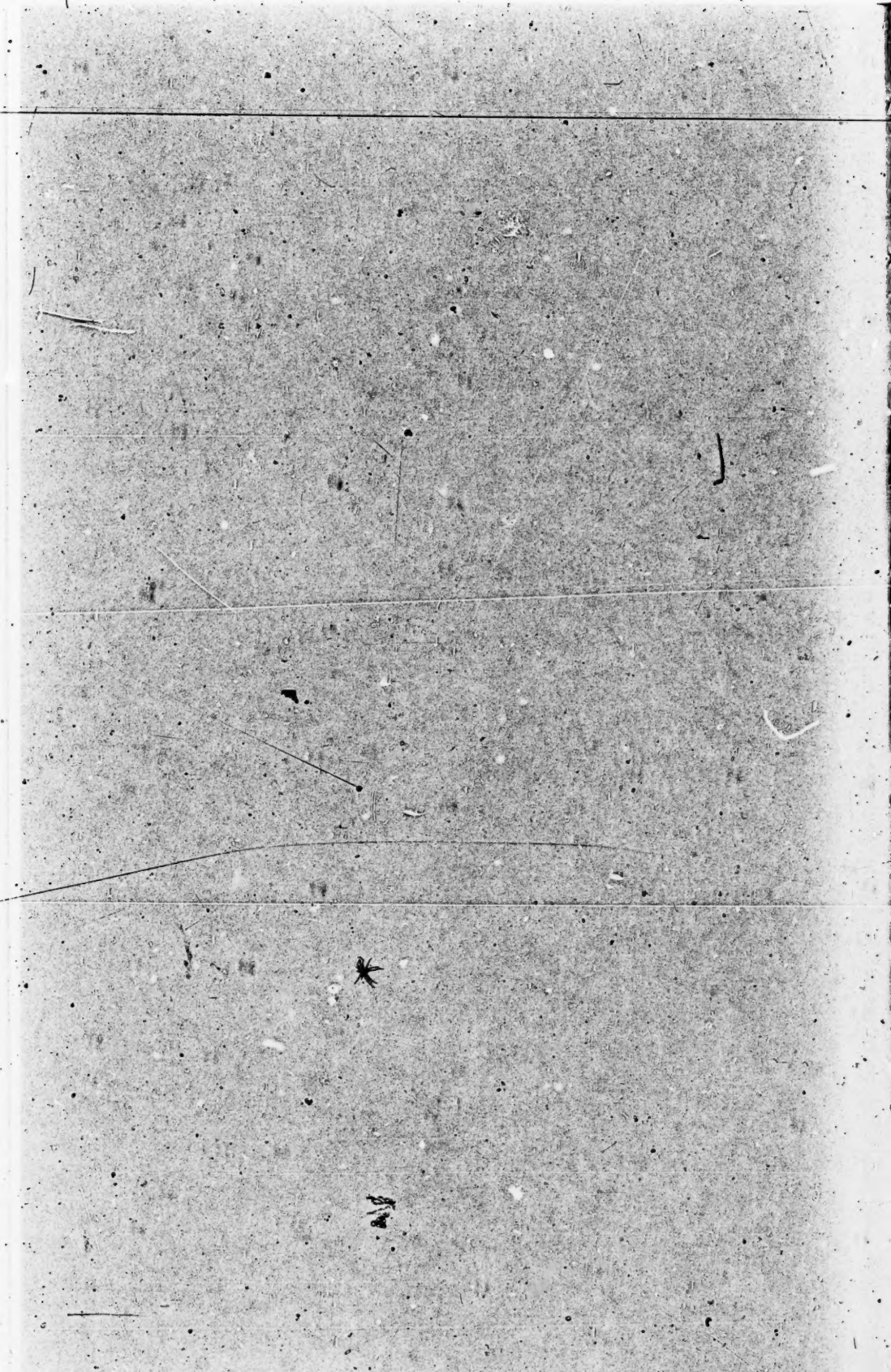
UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

JOHN E. LESOW
JAMES E. LESH
3737 N. Meridian Street
Indianapolis 8, Indiana
Attorneys for Appellant.

C. E. Pauley & Co., Inc., Indianapolis



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The appellant, for the reasons ~~hereinafter stated~~; respectfully petitions the Honorable Court to rehear its decision entered herein April 18, 1960, granting appellees' motion to affirm and affirming the judgment of the distri. court.

STATEMENT

This is an action, commenced in the district court, to vacate and set aside a decision of the Interstate Commerce Commission which held that a certificate of public convenience and necessity purchased by appellant must be restricted to a one-way movement, with respect to certain points, even though the certificate provides that movements may be made "to and from" such points. The three-judge statutory court decided that the complaint should be dismissed, and this direct appeal followed.

After the filing of appellant's Jurisdictional Statement and the docketing of the appeal, appellees filed their motion to affirm, which motion, as stated, the Court granted on April 18, 1960.

WHY THE PETITION SHOULD BE GRANTED

With great deference to the Court's views in granting appellees' motion to affirm, appellant respectfully submits that the Court below is in error and that the questions involved are of substantial importance, not only to appellant but to the motor carrier industry as well, and that therefore opportunity should be granted for full hearing on the merits.

In its Jurisdictional Statement appellant fairly demonstrated that the words "to and from" had been construed by its predecessors and by even opposing carriers as clearly conferring the right to make for-hire transportation movements in both directions. The phrase consists of such simple English words that no one should seek to interpret it as meaning only half of what it says. That is exactly what the Commission did in its decision which is here in dispute. In its Jurisdictional Statement, appellant discussed this

question at some length, but it does not seem appropriate here to reiterate such discussion.

In its motion to affirm, appellees refused to meet the above point head-on. Rather, they sought the shelter of the principle sometimes announced by this Court that only where the Commission's decision is arbitrary or capricious will it be disturbed. Appellant does not challenge this as a proposition of law. It is appellant's position, however, that this record affords no room for the application of that principle. The correct criterion to be applied is that where, as here, the Commission's decision is plainly erroneous, appellant is entitled to the protection provided by the Administrative Procedure Act, 5 United States Code Sections 1001, 1009(e). See *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express et al.*, 351 U.S. 49, 54 (1956); *Chicago M., St. P. & P. R. Co. v. Moutti Peat Products, Ltd., et al.*, 253 F. 2d 449, 454 (9th Cir. 1957); *Grace Line, Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959).

If appellant is correct in its contention that the Commission plainly erred in deciding that the phrase "to and from" means exactly the same thing as if only the word "to" appeared in the certificate, then it is easy to see that a power greater than was ever contemplated by the Congress is to be found in the Commission. In its decision the Commission said that the phrase was without ambiguity and that it meant one way only. The district court, however, held that the phrase was ambiguous. It is appellant's contention, on the other hand, that the district court erred in its view that "to and from" is ambiguous, and that the Commission was correct in saying there was no ambiguity, but *incorrect* in deciding that the phrase means the same thing as if the words "and from" were deleted. Actually, the question seems so simple that there should have been

no doubt about the matter—as indeed there was none, until the Commission, out of a clear sky, inserted its restrictive interpretation when the matter reached it on the second hearing of the purchase proceedings. If it is within the power of the Commission to strip the flesh and blood from a certificate by interpretation in derogation of the plain words of the certificate, then there must be hundreds of motor carriers whose certificates are in jeopardy.

In its motion to affirm, appellees urged that under the doctrine announced in *Callanan Road Co. v. United States*, 345 U.S. 507, appellant is estopped from challenging the Commission's decision. In that connection, appellees asserted that the district court was in error in holding, as it did, that the *Callanan* Case did not rule the case at bar, because, unlike the situation in the *Callanan* Decision, a direct attack has been made here. While, as this Court can appreciate, appellant has no way of knowing just why the Court sustained appellees' motion to affirm herein, nevertheless appellant wishes to emphasize that the *Callanan* Case has no application here. The district court's opinion fully and correctly distinguishes that decision.

Lastly, it must be pointed out to the Court that if appellant is correct in its contention that a two-way compensatory operation is in fact accorded by the certificate purchased by appellant, then a most serious injustice has been done. The Court knows as a matter of common knowledge that any trucking business which permits the carrier to operate for hire in only one direction is inefficient and most uneconomical. The record is clear that when appellant contracted to buy the operating rights in question, appellant and the seller—and even the opposition carriers—thought beyond question that a two-way operation with respect to the disputed intermediate and off-route points was granted

by the certificate. Therefore, it is obvious that when the Commission whittled these rights in two, appellant received appreciably less than what it had bargained for. It follows that by consummating the purchase, after years of litigation before the Commission, appellant may not rightly be said to be estopped from challenging the Commission's decision with respect to the point involved in this appeal. Before estoppel may be asserted against appellant, someone must be shown to have suffered as a result of appellant's acts or omissions. No such thing may be demonstrated here.

WHEREFORE, appellant respectfully prays that this petition for rehearing be granted and that the Court's said decision of April 18, 1960, be set aside.

Respectfully submitted,

JOHN E. LESOW
JAMES E. LESH
3737 N. Meridian Street
Indianapolis 8, Indiana

Attorneys for Appellant.